

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the matter of:

Motion Picture Association of America

Petition for Waiver of  
47 C.F.R. § 76.1903

CSR-7947-Z  
MB Docket No. 08-82

To: The Secretary's Office  
Attn: Chief, Media Bureau

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Federal Communications Commission  
Office of the Secretary

COMMENTS ON PETITION FOR EXPEDITED SPECIAL RELIEF

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July 21, 2008

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TiVo Inc. ("TiVo"), by its attorneys and pursuant to Section 76.7(b)(1) of the Commission's rules, 47 C.F.R. § 76.7(b)(1), hereby submits these Comments on the Petition for Expedited Special Relief (the "Petition") filed by the Motion Picture Association of America (the "MPAA") in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The MPAA seeks a waiver of Section 76.1903 of the Commission's rules, 47 C.F.R. § 76.1903, which prohibits the use of selectable output control ("SOC") by multi-channel video programming distributors ("MVPDs"), so that it may make high-definition movies available to MVPD subscribers before the films are released on prerecorded media such as DVDs (the "Service"). The MPAA's members should be commended for pursuing new business models. The Bureau should grant the MPAA's waiver request, but should impose certain conditions on

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<sup>1</sup> The Bureau placed the Petition on public notice June 5, 2008. See Public Notice, *MPAA Files Petition for Waiver of the Prohibition on the Use of Selectable Output Control* (47 C.F.R. § 76.1903), 23 FCC Rcd 8175 (Med. Bur. 2008). On June 20, the Bureau granted a request by the National Association of Theater Owners to extend the deadline for comments in this proceeding. See *Motion Picture Association of America, Inc. Petition for Waiver of 47 C.F.R. § 76.1903*, 23 FCC Rcd 9614 (Med. Bur. 2008).

the waiver to ensure that no unanticipated problems occur and to prevent consumer confusion and discrimination among devices.

## II. TIVO SUPPORTS NEW BUSINESS MODELS WHICH BRING MORE CHOICE TO CONSUMERS

Because TiVo believes that consumers should have access to as wide a range of content as possible, TiVo applauds the MPAA's members for pursuing new business models that should bring enhanced entertainment options to customers. TiVo, however, is not yet persuaded that the Service is, indeed, a new business model. The MPAA's Petition does not specify, for example, whether the high-definition movies will be made available free on demand, whether consumers will pay upon each viewing, or whether consumers will be able to subscribe to the Service. Nor does the MPAA's petition explain when the window of permitted SOC use would close, if ever, for a particular movie: read literally, the requested waiver would last indefinitely if a particular movie is never released on DVD or other media without the ability to disable audiovisual outputs.<sup>2</sup> A waiver limited to the 120-day period between theatrical release and home media release would ensure that the Service truly presents a new and exciting business model. On the other hand, a waiver that allows the use of SOC indefinitely for high-definition content would subvert the Commission's SOC rules by allowing the use of output control for a business model – traditional home video release – that is not made “new” by virtue of enhanced content resolution.<sup>3</sup> Of course, because the details of the Service are still to be negotiated by the

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<sup>2</sup> See Petition at note 1 (prerecorded media, in the context of determining the date that would end the waiver period, “would not include media formats comparable to the new Services,” i.e., those, like Blu-Ray discs, with similar output restriction capability). *But see* Petition at 6 (“Once content provided through the Services is released in the home video sale/rental market ... the Commission’s encoding rules would continue to apply as they do today.”). The Petition in fact does not define the release window with any precision. Rather, it states the Service will be provided to consumers “*prior to the normal release date* of prerecorded media (e.g., DVDs) for general in-home viewing.” Petition at 1 (emphasis supplied). Does this mean that the waiver will no longer apply to a particular movie once that movie is released on DVD or any other physical format? Would the waiver sunset automatically 120 days after a film’s theatrical release (the “normal” DVD release date)?

<sup>3</sup> See *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems* (continued . . .)

MPAA's members and MVPDs, the MPAA may not be able to describe fully the business model that will develop.

When it prohibited the use of selectable output control, the Commission noted that the issue involved a "delicate balancing of interests."<sup>4</sup> Specifically, the Commission explained that content owners had a "legitimate interest in protecting their content from piracy" and that consumers expected that "their digital televisions and other equipment will work to their full capabilities."<sup>5</sup> This balance is as important now as it was then. TiVo believes that a properly crafted waiver will maintain this balance and allow the MPAA's members to bring exciting new content to consumers.

### **III. THE WAIVER SHOULD BE GRANTED WITH CERTAIN CONDITIONS.**

The Bureau should grant the MPAA's request for waiver of 47 C.F.R. § 76.1903, but should impose certain conditions upon the waiver to prevent confusion, avoid discrimination, and insure that no unintended consequences arise. Specifically, any waiver must (a) be temporary; (b) prohibit the disabling of approved digital outputs; (c) ensure that output certification by the MPAA's members is non-discriminatory and subject to Commission review; and (d) ensure that, prior to purchase, consumers receive notice that certain outputs will be disabled.

#### **A. The Waiver Should Be Temporary.**

In order to ensure the Service truly is a new business model and so any unanticipated problems may be addressed, the Bureau should grant only a temporary waiver at this time. While a permanent waiver might be appropriate eventually, at this stage such relief is

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(... continued)

*and Consumer Electronics Equipment, Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20885, 20910-2 (2003) (*Unidirectional Plug and Play Order*).

<sup>4</sup> *Id.* at 20911.

<sup>5</sup> *Id.*

inappropriate given the untested and ill-defined nature of the Service as well as the potential for unintended consequences as a result of the Waiver. Instead, TiVo believes a limited two-year waiver of the SOC prohibition would provide enough time to allow MPAA members to negotiate the terms of the Service with confidence and describe with clarity the parameters of the "new business model" that has developed, while giving the Bureau an opportunity to assess the results of the waiver before making any grant permanent.

Although it supports new business models and enhanced consumer choice, TiVo is concerned the waiver, as proposed, may be used to discriminate against competitive equipment manufacturers and among MVPDs. The Service, offered jointly by the MPAA's members and MVPDs, could be used to competitively disadvantage the significant number of competitive unidirectional TiVo set-top boxes consumers already own. Although it would be possible to deliver the Service to TiVo boxes by means other than two-way cable service (for example, by using secured content delivery via broadband), MVPDs have little commercial motive to support delivery solutions for competitive navigation devices. Likewise, if the Service is made available only through one sector of the MVPD market (i.e., only via cable and not via DBS or IPTV), the other sectors of the market would struggle to compete without what may very well become "must-have" content.

TiVo believes the waiver should therefore be granted for a provisional two-year period. Rather than requiring at the outset that the Service be made available to MVPDs on a non-discriminatory basis, or that the Service be made available through secured delivery mechanisms to any navigation device that can deliver it, instead the Bureau should grant a waiver of limited duration to ensure that these conditions are imposed only if necessary. After the initial period, the Bureau will be able to consider whether to grant a permanent waiver, and with what conditions. At that time, stakeholders will have the opportunity to raise concerns or express support based on their experiences with the Service. Furthermore, after this initial period the business model for the Service will have developed sufficiently for the Bureau to determine whether the model is truly new.

**B. The Service Must Be Available Via All Approved Outputs of Any CableLabs-Approved Devices When Delivered by Cable MVPDs.**

To prevent consumer confusion and discrimination among devices, the Bureau should require that, at a minimum, the Service may not disable CableLabs-approved protected digital outputs on any CableLabs-approved device, including both one-way and two-way devices. Consumer electronics manufacturers such as TiVo have made significant investments and brought innovative devices to market in reliance on the standards created by CableLabs. Likewise, consumers have made significant investments in innovative devices in reliance on the continued compatibility of those devices with their cable services. CableLabs has promised that “[c]able subscribers with OpenCable-enabled digital televisions, retail set-top boxes, and other interactive digital cable products will be able to receive all of the cable operator’s services just as if the subscriber was leasing a comparable set-top box from the operator.”<sup>6</sup> If CableLabs-approved protected digital outputs were disabled, as would be possible under the requested blanket waiver, consumers who relied on assurances that their devices would be compatible would face confusion and frustration as their devices seemingly malfunctioned, and device manufacturers would lose the value of their significant investments in manufacturing compliant devices.

Content providers such as the MPAA’s members, Cable MVPDs such as CableLabs’ members, and consumer electronics manufacturers such as TiVo are all partners in the effort to bring innovative entertainment options to consumers. The requested waiver of 47 C.F.R. § 76.1903, if granted with the appropriate conditions, will be another step toward that goal. Without protection for approved devices, however, a waiver may lead to confusion and discrimination.

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<sup>6</sup> CableLabs, OpenCable™ Project Primer, <http://www.opencable.com/primer/> (last visited May 20, 2008).

**C. The Service Must Be Available Via All CableLabs-Approved Protected Digital Outputs and Via Any MVPD-Approved Digital Output Protection Technology When Delivered By IPTV and DBS MVPDs.**

To prevent consumer confusion and discrimination among devices used to receive services provided by other MVPDs, the Bureau should likewise require that, at a minimum, the Service may not disable protected digital outputs identical to those approved by CableLabs that are included on a non-cable set top box (which would not receive CableLabs certification). In addition, the Bureau should require the Service not disable any protected digital outputs that DBS and IPTV providers may approve for use with their systems outside the CableLabs process, as consumers and device manufacturers should be able to rely on these approvals.

**D. The Output Certification Process Must Be Non-Discriminatory and Subject to Commission Review**

If the MPAA's members certify protected outputs in addition to those approved by CableLabs or the non-cable MVPDs for use with the Service, the Bureau should require they do so using a fair and reasonable process. This process should result in a written decision that would be subject to Commission review. The MPAA requests that "[e]ach Petitioner and its MVPD partners [be given the authority to] determine through commercial negotiations the appropriate outputs and content protection tools for use with their Services."<sup>7</sup> Independent certification authority would give the movie studios remarkable power over the technical specifications of devices that could easily be leveraged in unrelated negotiations. TiVo believes that content owners' input into the certification and decertification process is best limited to proposing protection standards and benchmarks that an independent test facility would measure and verify. Nevertheless, if the MPAA's members demand the ability to certify additional outputs for use with the Service, they must do so in a reasonable, fair, and open manner. The Bureau should ensure the process is non-discriminatory by requiring written certification decisions approving or denying certification that, like certain CableLabs certifications, are

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<sup>7</sup> Petition at 6.

subject to Commission review.<sup>8</sup> The Bureau should not delegate the Commission's authority over approving outputs for the Service directly to the content industry without retaining the ability to review resulting decisions.

**E. An Appropriate Consumer Warning Should Be Required.**

The Bureau should require a clear and conspicuous warning be provided before any purchase to Service users that the Service may not be available on all audiovisual outputs. The MPAA understands the importance of clearly explaining to consumers the limitations of the Service. In the Petition, the MPAA describes one possible implementation of the Service as "messed to consumers as being available only to those subscribers who have the appropriate equipment. . . ."<sup>9</sup> Such notice is necessary to allay likely consumer confusion about the Service, but is not sufficient to address all potential confusion. Consumers with "appropriate equipment" may also have incompatible devices or unprotected outputs in their home theater, and likely expect that all of their devices will continue to function when using the Service. Unless these consumers have clear notice that particular outputs and devices will not function with the Service, they will assume their equipment is malfunctioning. Clear notice to Service users that limited outputs are a feature of the Service rather than a problem with their equipment will save consumers hours of frustration and will save device manufacturers and MVPDs significant customer support resources. The Bureau should therefore require that such clear notice be provided prior to any purchase of the Service (in addition to notice that the Service is available only to subscribers with appropriate equipment) as a condition of any waiver.

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<sup>8</sup> *Unidirectional Plug and Play Order*, 18 FCC Rcd at 20903.

<sup>9</sup> Petition at 5.

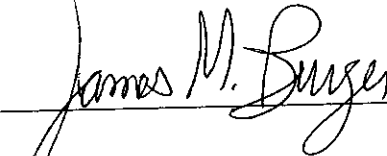


#### IV. CONCLUSION

For the foregoing reasons, the Bureau should grant the Petition with the aforementioned safeguards.

Respectfully submitted,

TIVO INC.

By: 

James M. Burger  
Derek Teslik

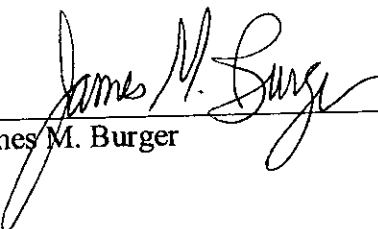
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Its Attorneys

July 21, 2008

#### VERIFICATION

To the best of my knowledge, information and belief formed after reasonable inquiry, these Comments on Petition for Expedited Special Relief are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and are not interposed for any improper purpose.

  
James M. Burger

July 21, 2008

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\* Admitted only in New York. Supervised by James M. Burger.

## CERTIFICATE OF SERVICE

I, Cynthia M. Forrester, a secretary at the law firm of Dow Lohnes PLLC, hereby certify that on this 21st day of July, 2008, I caused a copy of the foregoing Comments on Petition for Expedited Special Relief to be served by first-class mail, postage prepaid (except as otherwise indicated), to the following:

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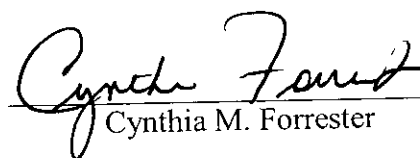
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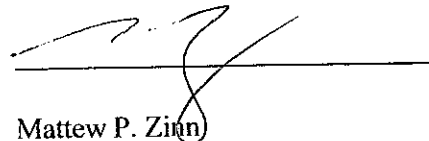
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To: The Secretary's Office  
Attn: Chief, Media Bureau

**DECLARATION OF MATTEW P. ZINN**

1. My name is Matthew P. Zinn and I am Senior Vice President, General Counsel & Chief Privacy Officer for TiVo Inc. ("TiVo").
2. I have read the foregoing "Comments on Expedited Petition for Special Relief" (the "Comments") and I am familiar with the contents thereof.
3. I declare under penalty of perjury that the facts contained herein and within the foregoing Comments are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry, that the Comments are well grounded in fact, that they are warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that they are not interposed for any improper purpose.



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Dated: July 21, 2008